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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 773

QUEEN INSURANCE COMPANY OF AMERICA,
Petitioner,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

Your petitioner prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above-entitled cause on November 20, 1940.

Opinions Below

The opinion of the Board of Tax Appeals (R. 118-131) is reported in 40 B. T. A. 483. The memorandum opinion of the Circuit Court of Appeals (R. 220-223) is unreported.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on November 20, 1940 (R. 223-224). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented

Whether the income tax imposed by the Dominion of Canada on the Canadian income of United States insurance corporations allowable as a credit against United States income tax is the full amount of the Canadian income tax liability before deduction of the premium tax, which deduction is permitted under Section 7 of the Canadian War Tax Act, 1917.

Statutes Involved

The material provisions of the United States and Canadian statutes are set forth in the appendix. The Canadian statutes are also contained in full in the record.

The statutory provisions directly involved are as follows:

Section 31 of the United States Revenue Act of 1934, c. 277, 48 Stat. 680, provides:

> "The amount of income, war-profits and excess-profits taxes imposed by foreign countries or possessions of the United States shall be allowed as a credit against the tax, to the extent provided in section 131."

Under the Canadian Income War Tax Act, 1917, as amended, there was imposed a tax of 13½% of petitioner's net income in Canada. Under the Special War Revenue Act, there was imposed a tax of 1% of petitioner's net premiums written. Under Section 6 of the Income War Tax Act, the Special War Revenue tax was not allowed as a deduction in determining net income. However, Section 7 of the Income War Tax Act, 1917, as amended, provided:

> "(7) A taxpayer shall be entitled to deduct from the tax that would otherwise be payable by him under this Act, the amount paid for any corresponding periods under the provisions of Parts II and III of the Special War Revenue Act."

Statement

This is a Federal Income Tax case and involves the income tax liability of the petitioner for the calendar year 1934.

The United States Board of Tax Appeals, in adopting stipulated facts, made substantially the following findings (R. 120-123):

The petitioner is a domestic stock insurance company transacting a fire and marine insurance business in the United States and Canada. It incurred and paid tax liabilities in Canada for 1934 under Part III of the Special War Revenue Act of 1915, as amended, and the Income War Tax Act of 1917, as amended. The actual amount paid under the former was $5,404.94, representing 1% of the net premiums received in 1934 on insurance in Canada. The actual amount paid under the Income War Tax Act was $1,519.11. The Income War Tax Act imposed a tax of 13½% upon the net income of the petitioner in Canada. Its net income, computed in accordance with the Act, was $51,289.23, and the tax at 13½% was $6,924.05. But the Income War Tax Act further provided in Section 7 that:

> "A taxpayer shall be entitled to deduct from the tax that otherwise would be payable by him under this Act, the amount paid for corresponding periods under the provisions of Parts II and III of the Special War Revenue Act."

Since the petitioner had paid $5,404.94 for the corresponding period (1934) under the provisions of Part III of the Special War Revenue Act, that amount was deducted from the tax liability under the Income War Tax Act and only the excess of the liability over the amount already paid was required to discharge the full tax liability of the petitioner.

The Board of Tax Appeals determined that the credit for Canadian income tax allowable under Section 31 of the Revenue Act of 1934 against United States income tax was $6,924.05 and that there was an overpayment of income tax for the year 1934 of $304.51.

The Circuit Court of Appeals reversed the Board's decision (R. 223) and decided that the amount of the credit for Canadian income tax was $1,519.11, the amount of the Canadian income tax liability of $6,924.05, less the tax paid under the Special War Revenue Act of $5,404.94 (R. 220-223).

Specification of Errors to Be Urged

1. The Circuit Court of Appeals erred in failing to hold that the amount which the petitioner was entitled to credit against its United States income tax liability for income taxes paid to the Dominion of Canada was the amount of its liability under the Canadian Income War Tax Act, 1917, before deducting the amount paid under the Canadian Special War Revenue Act, 1915, and erred in holding that the amount of the credit should be limited to the net amount paid under the Canadian Income War Tax Act, 1917, after deducting the amount paid under the Special War Revenue Act, 1915.

2. The Circuit Court of Appeals erred in reversing the decision of the Board of Tax Appeals.

Reasons for Granting the Writ

1. The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. Since Congress, in the Revenue Acts of 1936, 1938 and 1940, has re-enacted the provisions granting relief to domestic taxpayers engaged in foreign enterprises by allowing a credit for foreign income taxes

against United States income taxes, such decision materially affects the petitioner's income tax liability for the year 1934 and each subsequent year.

Such decision effectively denies this relief, or reduces it to an absurd minimum in the case of the petitioner and all other domestic insurance companies transacting business in Canada. From an examination of the official insurance reports published by the Department of Insurance of Canada for the year ending December 31, 1939, it has been determined that there are 221 American insurance companies, licensed in Canada. The income tax liabilities of all or most of such companies for each year still open for the determination of income tax liability and for each year hereafter are, or will be affected by the decision on this question.

2. The decision of the Circuit Court of Appeals is contrary to the established practice of the Bureau of Internal Revenue for over twenty years. Congress, in the Revenue Act of 1918, granted relief to domestic taxpayers engaged in trade or business in foreign countries. Such relief consisted in the allowance of a credit against United States income tax of foreign income taxes. For over twenty years, the petitioner, as well as other insurance companies, were allowed a credit for Canadian income taxes in an amount equal to the income tax liability under the Canadian Income War Tax Act, without reduction on account of the amount of tax paid under the Special War Revenue Act. The present decision reverses this practice, although the credit provisions of the Revenue Act of 1934 are not materially, or substantially, different from those in the Revenue Acts of 1918, 1921, 1924, 1926 or 1928. Clearly, any decision which reverses the accepted practice of over twenty years' standing should be carefully and fully reviewed before it becomes the law on the question.

3. The decision of the Circuit Court of Appeals failed to recognize that whether a payment of a foreign tax con-

stitutes a payment of a foreign income tax allowable as a credit under Section 31 of the Revenue Act of 1934, must be determined in the light in which such terms are used in our statute (*Biddle* v. *Commissioner,* 302 U. S. 573).

The Board found the petitioner's net income subject to income tax in Canada to be $51,289.23, upon which the income tax liability at 13½% was $6,924.05. This amount would have been payable had not $5,404.94 already been paid under the Special War Revenue Act and, by the provisions of Section 7 of the Income War Tax Act, was not required to be paid again. The petitioner, having incurred an income tax liability of $6,924.05 for the year 1934, and having paid taxes of such amount to Canada, the total amount so paid was, within the terms of our statute, an income tax.

However, the Court, ignoring the terms of our statute and by following a highly technical construction of the Canadian Act, held that the income tax was the balance or net amount payable after deducting the payment of the Special Revenue Tax from the amount otherwise payable. This conclusion begs the question. True, only the net amount was payable after such deduction, but this was only because the amount represented by the Special War Revenue Tax had already been paid and, therefore, such amount was not payable again. The fact of payment was clearly established, and the Board found that the petitioner paid total taxes of $6,924.05. The Court, however, relying on the words in the Canadian statute "would otherwise be payable" erroneously concluded that only the amount of $1,519.11 was paid as an income tax. Whereas both the payment of $5,404.94 and the payment of $1,519.11 served to satisfy and discharge the income tax liability of $6,924.05.

4. The decision of the Circuit Court of Appeals results in an unjustified discrimination against insurance companies, as may be seen from the following comparison of

a domestic insurance company's Canadian tax liability with that of a domestic non-insurance company:

	Insurance Company	*Non-Insurance Company*
Net profits	$44,365.18	$44,365.18
Add: S. W. R. Tax	5,404.94	.....
Income War Act Tax	1,519.11	6,924.05
Taxable income	$51,289.23	$51,289.23
Tax at 13½%	6,924.05	6,924.05
Less: S. W. R. Act Tax	5,404.94	.....
Income tax payable	$ 1,519.11	$ 6,924.05

Under the Court's highly technical interpretation of the credit provisions, the non-insurance company would be allowed a credit of $6,924.05, whereas the insurance company would be allowed a credit of only $1,519.11. The Court would insist on this discrimination in spite of the fact that the net profit of each company was $44,365.18; the taxable profit, $51,289.23; the income tax liability, $6,924.05; and the tax payments, $6,924.05.

In short, the Court looked to the form of the Canadian taxes paid by the petitioner and not to the substance or effect of such payments. The fact is that the premium tax payments had all the characteristics of an income tax. Such tax was levied on net premiums written—i. e., on gross premiums less return premiums and reinsurance premiums. It was not levied on gross receipts. The petitioner was entitled to deduct return premiums paid to insureds on cancellation of policies and the reinsurance premiums paid to other insurance companies, which is one of the elements of cost in the transaction of petitioner's business. The tax so paid— like an income tax and unlike an excise tax—was not deductible in determining net income subject to income tax. The tax so paid—again like an income tax and unlike an excise tax—reduced the income tax payable. Therefore, in substance and effect, such tax

payment had all the characteristics of an income tax and reduced, discharged and satisfied the income tax liability to the extent paid so that only the balance of the income tax liability remained to be paid.

The failure of the Circuit Court of Appeals to take these characteristics and the discharge of the income tax liability into consideration coupled with the Court's technical interpretation of what our law requires has resulted in the denial of the relief which Congress intended to grant to domestic taxpayers engaging in foreign enterprises. Therefore, it is respectfully asserted that the Court's decision is contrary to the principle announced by the Court in *Burnett* v. *Chicago Portrait Co.*, 285 U. S. 1, to the effect that the credit provisions of our law must be construed "*so as to achieve, and not defeat its aim*".

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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